

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD L. McCUSKER,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
PENN FUEL GAS, INC.	:	
SUPPLEMENTAL EXECUTIVE	:	
RETIREMENT PROGRAM,	:	
Defendant	:	NO. 01-0874

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

July 11, 2003

Plaintiff Edward L. McCusker ("McCusker"), seeking retirement benefits denied him by his employer, filed this action pursuant to 29 U.S.C. § 1001 et seq., the Employee Retirement Income Security Act ("ERISA"). McCusker filed a motion for partial summary judgment; defendant Penn Fuel Gas, Inc. Supplemental Executive Retirement Program ("SERP") filed a cross-motion for summary judgment. For the reasons set forth below, McCusker's motion will be granted and SERP's motion will be granted in part.

I. BACKGROUND

A. The SERP

On April 27, 1997, Penn Fuel Gas, Inc. ("Penn Fuel") established its Supplemental Executive Retirement Program to provide supplemental benefits to selected Penn Fuel executives. The SERP is an "employee benefit plan" within

the meaning of ERISA, 29 U.S.C. § 1002(3); specifically, it is an "employee benefit pension plan" under 29 U.S.C. § 1002(2)(A), and a "defined benefit plan" under 29 U.S.C. § 1002(35). Most significant to this action, the SERP is also a top hat plan; a "plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly trained employees" 29 U.S.C.A. §§ 1051(2), 1081(a)(3), and 1101(a)(1) (West 1999).

The SERP is administered by the SERP Administration Committee ("the Committee"), appointed by the Board of Directors of Penn Fuel. At all relevant times, the Committee consisted of employees of Penn Fuel, including both the CEO and the Vice President of Human Resources.

B. The SERP's Retirement Benefits

The SERP agreement contains the following formula for calculating the benefits a participant is entitled to upon retirement:

4. PROGRAM RETIREMENT INCOME

The Company agrees to pay a Program benefit to a Participant under the following circumstances and conditions:

(a) Normal Retirement Benefit. The Vested Benefit payable to a Participant participating in the Program on or after the Participant's Normal Retirement Date (the "Normal Retirement Benefit") shall be:

(1) (i) 2.0% of the Participant's Final Average Compensation multiplied by the Participant's Years of Service (not to exceed 15); plus (ii) 0.5% of the Participant's Final Average Compensation multiplied by the Participant's Years of Service in excess of 15 but not in excess of 35; less (iii) the Participant's benefit under the Qualified Plan.

(2) In determining the amount of the reduction under clause (iii) above, the benefit under the Qualified Plan shall be deemed to be the amount of the single life benefit actually payable to the Participant under the Qualified Plan at the time of the calculation hereunder.

This section of the SERP also contains a formula for reducing this Normal Retirement Benefit in the case of early retirement:

(b) Early Retirement Benefit. If the Participant is entitled to a Vested Benefit on or after the attainment of age 55, the Participant may, while employed by the Company and upon written application to retire made to the Company, and upon the receipt of the Company's written consent to such early retirement, receive an annual benefit equal to the Normal Retirement Benefit, as calculated under Section 4(a) hereof, multiplied by 100% minus 1/2% (one-half of one percent) for each month by which the Participant's retirement date precedes the Participant's 62nd birthday.

At issue in this case is the proper interpretation of certain language within the above clauses.

C. Plaintiff's Retirement

At the time of his retirement in 1998, McCusker had been employed by Penn Fuel since 1972, and had attained the position of Vice President and Treasurer. McCusker has been a participant in the SERP since January 1, 1995. In August

1998, when he was 56 years old, Penn Fuel was acquired by PP&L Resources, Inc., and McCusker's employment was terminated.

McCusker then requested, and received, Penn Fuel's approval to retire early under the SERP, effective November 1, 1998. At the time of his retirement, McCusker's Years of Service under the SERP were 23 years, 7 months; his final average compensation under the SERP was \$143,571.09; and his retirement date preceded his 62nd birthday by 65 months. According to the formula outlined in the SERP agreement, McCusker determined he should receive an annual SERP benefit of \$16,837.89.

The actual benefit McCusker has received from Penn Fuel has been only \$10,962.85 per year, \$5,875.04 less than his calculations suggested. This lower amount was based upon calculations by Towers Perrin, a firm retained by Penn Fuel to oversee both the pension and SERP plans.

On December 8, 1998, McCusker wrote to Ron Frederick, a member of the Committee, to dispute the Towers Perrin calculation. On January 7, 1999, Frederick responded that the Committee would treat his December 8, 1998 letter as a claim for benefits and promised a written determination within 30 days. McCusker wrote back on February 4, 1999, to dispute any suggestion that the terms in the SERP agreement

were ambiguous. Frederick, replying on March 8, 1999, informed him the Committee had affirmed its prior decision supporting the Towers Perrin calculation.

This action charges SERP with denial of benefits under the SERP agreement (Count I) and violation of fiduciary duties under ERISA (Count II).¹ McCusker asks that the Court declare his annual "Early Retirement Benefit" under the SERP is \$16,837.89 and enter judgment in the amount of \$489.59 for each month this benefit has been underpaid. He also seeks interest and attorney's fees, as well as an injunction preventing Penn Fuel from using Towers Perrin or other actuaries currently or previously employed by the SERP sponsor.

II. STANDARD OF REVIEW

McCusker moves for partial summary judgment (as to Count I) and SERP moves for summary judgment, both pursuant to Fed. R. Civ. P. 56. Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to summary judgment as

¹ McCusker's charges also include conflict of interest and violation of claims procedures under ERISA, but because we find there is a denial of benefits through bad faith and unreasonableness, these charges need not be addressed.

a matter of law." Fed. R. Civ. P. 56.

To be granted summary judgment, a party must show "the absence of a genuine issue as to any material fact, and for these purposes the material . . . lodged must be viewed in the light most favorable to the opposing party." Adickes v. S.H. Cress & Co., 398 U.S. 144, 157 (1970). Once the moving party has met the burden of showing the absence of any genuine issue of material fact, the nonmoving party must go beyond the pleadings to show that there is a genuine issue for trial. See Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

III. DISCUSSION

A. Count I - Denial of Benefits under the SERP

The SERP is an ERISA plan, and more specifically it is a top hat plan under ERISA. See In re New Valley Corp., 89 F.3d 143 (3d Cir. 1996); Goldstein v. Johnson & Johnson, 252 F.3d 433 (3d Cir. 2001). Top hat plans are given special status under ERISA, and are not subject to many of its requirements. "The dominant characteristic of the special

top hat regime is the near-complete exemption of top hat plans from ERISA's substantive requirements." In re New Valley Corp., 89 F.3d at 149. Most germane to this action is 29 U.S.C.A. § 1101(1) (West 1999), exempting "top hat plans from ERISA's fiduciary responsibility provisions, including the requirement of a written plan" Id.

Unlike other ERISA plans, all of which must "be established and maintained pursuant to a written instrument," 29 U.S.C.A. § 1102(a)(1) (West 1999), top hat agreements can be partially or exclusively oral. And unlike other ERISA plans, under which interpretation is limited strictly to the language of the plan, top hat agreements are governed by the principles of federal common law. See In re New Valley Corp., 89 F.3d at 149; Goldstein, 252 F.3d at 443; Kemmerer v. ICI Americas Inc., 70 F.3d 281, 287 (3d Cir. 1995).

Regular ERISA plans are analogous to "trusts" for employees, so that reviewing courts owe deference to the discretionary decisions of plan administrators just as the discretionary decisions of a trustee receive deference. See Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989); Goldstein, 252 F.3d at 435. The interpretation of a top hat plan, on the other hand, has been compared to that of a unilateral contract, where "neither party's interpretation

should be given precedence over the other's, except in accordance with ordinary contract principles." Goldstein, 252 F.3d at 443.²

The SERP agreement contains a clause granting the Committee broad powers of interpretation:

5(a) Administration of Program. The Program shall be administered by a committee appointed by the Board of Directors (the "Committee"). Such Committee shall have full power, discretion and authority to interpret, construct and administer the Program and any part thereof and its decisions shall be final and binding on all parties.

Generally, neither party's interpretation of a top hat plan is entitled to more deference than the other's, though "there appears to be no reason why . . . a written clause explicitly granting authority to the plan administrator to interpret the terms of the plan . . . should not be given effect as part of the unilateral contract that constitutes a top hat plan." Goldstein, 252 F.3d at 435.

In Goldstein, our Court of Appeals affirmed the validity of a clause similar to the one in the SERP, but stated that administrators granting themselves such discretion may do so "only as long as [their]

² The Supreme Court, in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989), found administrators entitled to deferential review under normal ERISA standards, but "given the unique nature of top hat plans, . . . the holding of Firestone Tire requiring deferential review for the discretionary decisions of administrators [is] inapplicable." Goldstein, 251 F.3d at 442. In a top hat plan such as the SERP, "[t]he 'deference' ordinarily due an ERISA plan administrator is available only to the extent that the plan grants the administrator discretion to interpret the terms of the plan." Id. at 443-44.

interpretations are reasonable and [they] exercise[] [their] responsibilities in good faith." Id. at 444. In a top hat plan, "any grant of discretion must be read as part of the unilateral contract itself [I]t must be given effect as ordinary contract principles would require

[D]iscretion must be exercised in good faith - a requirement that includes the duty to exercise the discretion reasonably." Id. (emphasis added). When reviewing the exercise of discretion, "courts retain the authority to conduct a de novo review as to whether a party has complied with its good-faith obligations." Id.

The language at issue is clause 4(a)(2) of the SERP agreement. Upon retirement, the annual benefit a participating employee has accrued under the SERP is reduced by the amount accrued under the company's Qualified (pension) Plan; this clause attempts to define this amount: "In determining the amount of the reduction under clause (iii) above, the benefit under the Qualified Plan shall be deemed to be the amount of the single life benefit actually payable to the Participant under the Qualified Plan at the time of the calculation hereunder."

Both parties agree that McCusker's annual benefit under the SERP alone is \$49,232.92; they disagree on the amount of the Qualified Plan benefit deducted from the SERP

calculation. The crux of this disagreement is the interpretation given to the words "actually payable . . . at the time of the calculation hereunder."

McCusker argues that the words "at the time of calculation hereunder" are unambiguous and clearly refer to his early retirement date, November 1, 1998, the date at which the calculations at question were actually performed, and "actually payable" refers to the amount of accrued benefit under the Qualified Plan actually payable to him on that date. That amount is \$24,287.90. When that amount is subtracted from his SERP benefit, and the difference is reduced according to the Early Retirement formula in clause 4(b) of the SERP agreement, McCusker's annual benefit payment under the SERP is \$16,837.89.

SERP, on the other hand, argues that the correct interpretation of "the time of the calculation hereunder" refers not to the time at which McCusker did retire, but rather to the time of his "normal retirement," which would be after his 65th birthday, on April 1, 2007. SERP argues that because the disputed phrase is within a clause entitled "Normal Retirement Benefit," both the benefit payable and the time of the calculation are meant to refer to McCusker's "normal retirement age" of 65.

Under this interpretation, the words "actually payable"

refer to the accrued pension benefits that would be payable upon McCusker's 65th birthday in 2007, the correct "time of the calculation hereunder." Such an interpretation is problematic, not only because it assumes McCusker would continue working to age 65 (his salary and contributions to the pension plan remaining constant until that time), but also because it calculates based on the amount that would have been payable to McCusker on April 1, 2007, had he retired on that date with only the years of service he had accrued at his actual termination date in 1998.

The federal common law of contracts provides the discretionary clause within the SERP should be given effect, with deference given to the administrator's interpretation of the disputed language. But this interpretation must still meet the standard of good faith and reasonableness.

At the time of the decisions involving McCusker's benefits, the SERP agreement contained a clause detailing arbitration procedures.³ The arbitration clause referred all disputes to an arbitration panel consisting of "three arbitrators, one appointed by each party, and a third,

³ This clause reads: 5(b) Arbitration. Any controversy or claim arising out of or related to . . . the interpretation, construction, or administration of the Program, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the Award rendered by the Arbitrators is binding and may be entered in any Court having jurisdiction thereof.

neutral arbitrator appointed by the first two arbitrators." It is unclear why SERP would include such a clause if the clause immediately preceding it in the agreement already granted the Committee "full power" of interpretation. This calls into question the extent of the discretionary clause granting "full power" of interpretation to the Committee.

The Board of Directors of Penn Fuel, by resolution dated March 26, 1999, sought to amend the SERP, upon advice of counsel, to remove this arbitration clause. This amendment was made retroactive to February 22, 1999, the day the Committee first met to address McCusker's claims.

The amendment itself violates clause 5(c) of the SERP agreement: "No such amendment shall retroactively impair or otherwise adversely affect the rights of any person to benefits under this Program that have accrued prior to that date." The amendment, when coupled with the specific date of its retroactive effect, is evidence that Penn Fuel was acting in a manner meant to impact McCusker's claims uniquely.

SERP insists this is not so. SERP asserts that the Committee reviewing McCusker's claims had nothing to do with enacting the amendment by the Board of Directors. This is not true, as then-CEO Terry Hunt sat on both the SERP Committee and the Board of Directors making the amendment.

Such a retroactive amendment is neither appropriate nor valid when it unilaterally alters the agreement that McCusker actually signed.⁴

SERP argues that the amendment did not impair McCusker's rights in any way, as he now has the right to review by a court of law rather than by an arbitration panel. Because this amendment was made retroactive to the date on which the Committee first met to address McCusker's claims, it could have been made specifically to prejudice McCusker's claims, and is evidence of bad faith on the part of SERP.

The Committee's interpretation must also be reviewed for reasonableness. SERP argues that McCusker's interpretation would lead to calculations providing greater benefits the earlier one retires, contrary to the intent of the SERP. SERP asserts its purpose was to retain key executives as long as possible, and this intent would not be served if there were actually an incentive to retire early.

Such an intent is not mentioned anywhere in the SERP; the section entitled "Purpose" says merely that the program was designed "for the purpose of providing . . . supplemental retirement benefits to selected key executives

⁴ Were the SERP agreement to be interpreted entirely as it was at the time McCusker agreed to it, then the arbitration clause would still be in effect, and this case could be sent to arbitration. However, at oral argument, both sides waived arbitration.

of the Company." Nothing is mentioned about retaining such executives.

Even assuming the intent of the SERP was to retain employees, such an intent is served under either party's interpretation. McCusker's interpretation encourages retention so long as the employee receives raises periodically; it only provides an incentive for early retirement if the employee's salary remained constant until retirement. Even then, there is still incentive for an employee to stay until at least age 62, because prior to that age an early retirement penalty is incurred by the participant, a penalty greater the earlier one retires. SERP's interpretation contradicts the plain language of the agreement; applying the usual meanings to the words in question leads to McCusker's interpretation.

Most significant is that SERP's original answer admitted the phrase "at the time of the calculation hereunder" referred to November 1, 1998, the date of McCusker's early retirement (Compl. ¶ 24 and Answer ¶ 24), and not April 1, 2007, as it later argued.⁵ If "the time of the calculation hereunder" is November 1, 1998, all that

⁵ SERP has argued the answer only admitted that the time of calculation was November 1, 1998, but that "actually payable" still refers to April 1, 2007, the date of "normal retirement age." This is contrast to its assertion at oral argument that both phrases refer to the date of "normal retirement age."

remains for interpretation is the phrase "actually payable." This phrase becomes unambiguous once the time of the calculation has been established. If the time of the calculation is November 1, 1998, the benefit "actually payable . . . at the time of the calculation hereunder" must be the amount payable to McCusker on that same date.

SERP even admitted in its answer that \$32,991.66, the amount used in its calculations, was not the amount "actually payable" to McCusker under the Qualified Plan on November 1, 1998. (Compl. ¶ 36 and Answer ¶ 36). Instead, the correct amount was \$24,287.90. Both parties stipulated at oral argument that Penn Fuel is currently paying this amount to McCusker annually under the pension plan (See Tr. of August 14, 2002 Hr'g, p. 33.); the amount actually paid should correspond to the amount "actually payable." McCusker's calculations are correct and SERP's are erroneous.⁶

SERP suggests an intent other than the one written into the agreement itself, and then relies on an interpretation contrary not only to the plain meaning of the words but also to SERP's own admissions. This makes its interpretation of

⁶ SERP's interpretation would allow Penn Fuel to pay McCusker a lower amount annually under the Qualified Plan, but to deduct a higher amount from his SERP benefit. In other words, SERP agrees with McCusker's calculation when it leads to a lower benefit payment under the Qualified Plan, but argues for an alternative interpretation when that same amount would mean a higher benefit payment under the SERP.

the disputed language unreasonable.

Because SERP's interpretation of the agreement is in bad faith and unreasonable, McCusker is entitled to a benefit of \$16,837.89 annually under the SERP, as well as back payments of \$489.59 per month (the difference between the correct payment and what McCusker was actually paid) for each month he has been underpaid since November 1998. McCusker will be granted partial summary judgment, as to Count I.

McCusker also asks for interest on these back payments. Though ERISA does not explicitly allow for pre-judgment interest, it does allow for a participant "to obtain . . . appropriate equitable relief to redress . . . violations" of a retirement plan. 29 U.S.C.A. § 1132 (a)(3)(B)(i) (West 1999).

Such relief may include the payment of pre-judgment interest. In Fotta v. Trustees of United Mine Workers, 165 F.3d 209, 214 (3d Cir. 1998), the Court of Appeals held that "a beneficiary of an ERISA plan may bring an action for interest on delayed benefits payments under section 502(a)(3)(B) of ERISA [29 U.S.C.A. § 1132(a)(3)(B)], irrespective of whether the beneficiary also seeks to recover unpaid benefits." Although an interest award "involves an exercise of judicial discretion," "interest is

presumptively appropriate when ERISA benefits have been delayed." Id. There being no evidence to rebut this presumption, McCusker will be awarded interest.

In determining the appropriate rate of interest for delayed benefit payments in an ERISA case, calculations take into account "two primary justifications for interest awards: (1) ensuring full compensation to the plaintiff; and (2) preventing unjust enrichment." Holmes v. Pension Plan of Bethlehem Steel Corp., 213 F.3d 124, 132 (3d Cir. 2000). Finding that the best way to balance these interests was to rely on equitable principles, the district court in Holmes held, and our Court of Appeals affirmed, that "restitution was the most equitable measure of interest due, and restitution would be achieved by awarding interest at the Treasury Bill yield rate as calculated according to the analogous provisions in 28 U.S.C. § 1961." Id.

Post-judgment interest under that statute is "calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield . . . for the calendar week preceding the date of the judgment." 28 U.S.C.A. § 1961 (West 2003). However, because of fluctuations in interest rates since November 1998, when McCusker first received less than his entitlement, calculating interest for the entire back

payment at the current rate would not be equitable, and would not match "ERISA's remedial goal of simply placing the plaintiff in the position he or she would have occupied but for the defendant's wrongdoing." Ford v. Uniroyal Pension Plan, 154 F.3d 613, 619 (6th Cir. 1998).

The equitable solution is to calculate interest on the unpaid benefit for each year McCusker was underpaid using the average 1-year constant maturity Treasury yield for that respective year (incomplete years are calculated pro rata, using the respective monthly average rate).⁷ This provides a total interest payment of \$2,440.31 for the period for which McCusker was underpaid.

Finally, McCusker requested an injunction to prevent SERP from using Towers Perrin or other actuaries currently or previously employed by the SERP sponsor; it will not be granted. This is not a class action, and McCusker is only entitled to individual relief. Once his dispute has been settled and his appropriate benefits determined, there is no basis for such an injunction.

B. Count II - Breach of Fiduciary Duty

SERP also seeks summary judgment on Count II.

⁷ The interest rates used for all of the calculations herein are based upon the weekly, monthly, or annual average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, available at <http://www.federalreserve.gov/releases/H15/data.htm>.

Both parties agree that under ERISA, the SERP is what is known as a "top hat" plan; a plan "which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees" 29 U.S.C.A. § 1101(a)(1) (West 1999). Top hat plans are subject to ERISA only as far as its enforcement provisions, and administrators of top hat plans are exempted from ERISA's fiduciary responsibility requirements. See In re New Valley Corp., 89 F.3d 143, 149 (3d Cir. 1996).

There is no cause of action under ERISA for breach of fiduciary duty in top hat plans, even though the plan administrators may be said to fall under ERISA's definition of "fiduciary." See Goldstein, 251 F.3d at 443 (top hat plan administrators are not fiduciaries under ERISA); In re New Valley Corp., 89 F.3d at 153 (no cause of action for breach of fiduciary duty in a top hat plan). SERP will be granted summary judgment on Count II.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD L. McCUSKER,	:	CIVIL ACTION
	:	
Plaintiff	:	
	:	
v.	:	
	:	
PENN FUEL GAS, INC.	:	
	:	
SUPPLEMENTAL EXECUTIVE	:	
	:	
RETIREMENT PROGRAM,	:	
	:	
Defendant	:	NO. 01-0874

ORDER

AND NOW, this ____ day of _____, 2003, upon consideration of the Motion for partial Summary Judgment of plaintiff Edward L. McCusker (Paper #13), the Cross-motion for Summary Judgment of defendant Penn Fuel Gas, Inc. Supplemental Executive Retirement Program (Paper #15), and all responses thereto, and for the reasons stated in the foregoing Memorandum, it is hereby **ORDERED** that:

On Count I - Denial of Benefits under the SERP:

1. The Motion for partial Summary Judgment of plaintiff
(Paper #13) is **GRANTED**;
2. The Cross-motion for Summary Judgment of defendant
(Paper #15) is **DENIED**;

On Count II - Breach of Fiduciary Duty:

1. The Motion for Summary Judgment of defendant (Paper
#15) is **GRANTED**.

S.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD L. McCUSKER,	:	CIVIL ACTION
	:	
Plaintiff	:	
	:	
v.	:	
	:	
PENN FUEL GAS, INC.	:	
	:	
SUPPLEMENTAL EXECUTIVE	:	
	:	
RETIREMENT PROGRAM,	:	
	:	
Defendant	:	NO. 01-0874

JUDGMENT ORDER

AND NOW, this ____ day of _____, 2003, upon consideration of the Motion for partial Summary Judgment of plaintiff Edward L. McCusker (Paper #13), the Cross-motion for Summary Judgment of defendant Penn Fuel Gas, Inc. Supplemental Executive Retirement Program (Paper #15), and all responses thereto, and for the reasons stated in the foregoing Memorandum, it is hereby **ORDERED** that:

1. Judgment is **ENTERED** in favor of plaintiff Edward L. McCusker and against defendant Penn Fuel Gas, Inc.

Supplemental Executive Retirement Program for damages
and pre-judgment interest in the amount of \$29,857.35;

2. Defendant SERP shall pay plaintiff a benefit under the
SERP of \$16,837.89 annually.

S.J.